

EX PARTE OR LATE FILED



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Melissa E. Newman  
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REDACTED – FOR PUBLIC INSPECTION

VIA COURIER

EX PARTE

FILED/ACCEPTED

FEB - 5 2008

Federal Communications Commission  
Office of the Secretary

February 5, 2008

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

ORIGINAL

Re: *In the Matter of Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange, WC Docket No. 07-9*

Dear Ms. Dortch:

Qwest Corporation hereby submits the attached *ex parte* and request for confidential treatment of certain information included in the *ex parte*, in the above-captioned proceeding.

An original and one copy of the non-redacted version are being submitted; and an original and four copies of the redacted version are being submitted. For both the redacted and non-redacted versions, an extra copy is provided to be stamped and returned to the courier. Both the redacted and non-redacted versions of the *ex parte* are being served on Staff of the Commission's Wireline Competition Bureau as indicated below. This cover letter does not contain any confidential information.

If you have any questions concerning this submission, please contact me at the information above.

Sincerely,

/s/ Melissa E. Newman

Attachments

cc: (via e-mail)

Tim Stelzig ([Tim.stelzig@fcc.gov](mailto:Tim.stelzig@fcc.gov))  
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**Daphne E. Butler**  
Senior Attorney

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**EX PARTE**

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Re: *In the Matter of Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange, WC Docket No. 07-9*

Dear Ms. Dortch:

Qwest Corporation ("Qwest") hereby requests confidential treatment of certain information included in the associated *ex parte*.

The confidential information references the number of access lines Qwest has remaining in the Terry, Montana exchange. The *ex parte* with the confidential information (that is, the non-redacted version) has been marked "**CONFIDENTIAL – NOT FOR PUBLIC INSPECTION**". Qwest requests that the non-redacted, confidential version of this *ex parte* be withheld from public inspection.

Qwest considers the number of access lines referenced in the *ex parte* as being competitively-sensitive in nature. This information is confidential commercial information that is "not routinely available for public inspection." As such, Qwest requests confidential treatment of this information and is filing a non-redacted version of this *ex parte* pursuant to both Commission rules 47 C.F.R. §§ 0.457(d) and 0.459. Pursuant to Commission rule, 47 C.F.R. § 0.459(b), Qwest provides justification for the confidential treatment of this information in the Appendix to this letter.

Qwest is simultaneously submitting, under separate covers, both a non-redacted and a redacted version of this *ex parte*. The redacted version of this *ex parte* is marked "**REDACTED - FOR PUBLIC INSPECTION**". Both the redacted and non-redacted versions of the *ex parte* are the same except that in the non-confidential version the number of access lines has been omitted.

If you have any questions concerning this submission, please call me on 303-383-6653.

Sincerely,

/s/ Daphne E. Butler

## APPENDIX

### Confidentiality Justification

Qwest requests confidential treatment of certain information regarding the number of access lines Qwest continues to provision in the Terry, Montana exchange. This information is competitively-sensitive information that is not routinely made available for public inspection. Such information should be afforded confidential treatment under both 47 C.F.R. § 0.457(d) and § 0.459.

#### 47 C.F.R. § 0.457(d)

Information contained in the *ex parte* is confidential and proprietary to Qwest as “commercial or financial information” under Section 0.457(d). Disclosure of such information to the public would risk revealing competitively-sensitive proprietary information. Therefore, in the normal course of Commission practice this information should be considered “Records not routinely available for public inspection.”

#### 47 C.F.R. § 0.459

Specific information in the *ex parte* is also subject to protection under 47 C.F.R. § 0.459, as demonstrated below.

#### Information for which confidential treatment is sought

Qwest requests that the confidential information contained in this *ex parte* be treated on a confidential basis under Exemption 4 of the Freedom of Information Act. This information is competitively-sensitive information which Qwest maintains as confidential and is not normally made available to the public. Release of the information could have a substantial negative competitive impact on Qwest. The confidential information is contained in the non-redacted version of Qwest’s *ex parte*, which is marked with the following legend: **CONFIDENTIAL – NOT FOR PUBLIC INSPECTION**.

#### Commission proceeding in which the information was submitted

The information is being submitted in *In the Matter of Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, WC Docket No. 07-9.

#### Degree to which the information in question is commercial or financial, or contains a trade secret or is privileged

The competitively-sensitive information designated as confidential references the number of access lines Qwest provisions in the Terry, Montana exchange. Release of this information would impact Qwest in a competitively-negative way as Qwest’s competitors would be able to utilize this information to the detriment of Qwest. As noted above, the data is competitively-sensitive information which is not

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normally released to the public and as such release could have a substantial negative competitive impact on Qwest.

Degree to which the information concerns a service that is subject to competition; and manner in which disclosure of the information could result in substantial competitive harm

The type of competitively-sensitive information in the *ex parte* would generally not be subject to routine public inspection under the Commission's rules (47 C.F.R. § 0.457(d)), which demonstrates that the Commission already anticipates that the release of this kind of information likely would produce competitive harm. Qwest confirms that release of its confidential and proprietary information would cause it competitive harm by allowing its competitors to become aware of sensitive proprietary competitive information regarding the operation of Qwest's business.

Measures taken by Qwest to prevent unauthorized disclosure; and availability of the information to the public and extent of any previous disclosure of the information to third parties

Qwest has treated and treats the information disclosed in its non-redacted *ex parte* as confidential and has protected it from public disclosure to parties outside of the company.

Justification of the period during which Qwest asserts that the material should not be available for public disclosure

Qwest cannot determine at this time any date on which this information should not be considered confidential or would become stale for purposes of this proceeding, except that the information would be handled in conformity with general Qwest records retention policies, absent any continuing legal hold on the information.

Other information that Qwest believes may be useful in assessing whether its request for confidentiality should be granted

Under applicable Commission and court rulings, the information in question should be withheld from public disclosure. Exemption 4 of the Freedom of Information Act shields information that is (1) commercial or financial in nature; (2) obtained from a person outside government; and (3) privileged or confidential. The information in question satisfies this test.



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Re: *In the Matter of Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange, WC Docket No. 07-9*

Dear Ms. Dortch:

On January 22, 2007, Qwest Corporation ("Qwest") filed a petition for forbearance from regulation as an incumbent local exchange carrier ("incumbent LEC") in the Terry, Montana local exchange. The Mid-Rivers Telephone Cooperative, Inc. ("Mid-Rivers") has already been declared an incumbent in the Terry exchange.<sup>1</sup> Mid-Rivers estimated that it served 93 percent of the access lines in the entire Terry exchange and 97 percent of the residential and business access lines within the Terry town limits.<sup>2</sup> Note that Qwest had only [begin confidential] [end confidential] retail access lines in service in Terry as of December 2005, and that number has declined to [begin confidential] [end confidential] as of December 2007. Qwest is clearly not winning customers back from Mid-Rivers. Qwest will venture a hypothesis that the publicly-stated market share figure Mid-Rivers released in 2006 (showing that it had 93% of the access lines in the Terry exchange at that time) is now understated. Qwest does not, however, have information to adequately estimate market share because it does not possess Mid-Rivers' data regarding access lines.

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<sup>1</sup> See *In the Matter of Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, Report and Order, 21 FCC Rcd 11506 (2006) ("Report and Order").

<sup>2</sup> *Id.* at 11506-07 ¶ 2.

Section 10(c) of the Act requires that the Federal Communications Commission (“Commission”) “forbear from applying any regulation or any provision of this [Act] to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets” if the following factors are satisfied:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.<sup>3</sup>

In making the Section 10(a)(3) public interest determination, Section 10(b) requires that the Commission consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.

#### **Section 224**

Qwest has petitioned for forbearance from regulation as an incumbent LEC under Section 224, which pertains to pole attachments.<sup>4</sup> Congress’s goal in enacting Section 224 was to ensure that an incumbent LEC’s control over poles and rights-of-way did not create a bottleneck that would stifle facilities-based competition.<sup>5</sup> Currently, Qwest has no requests from others to attach to Qwest-owned poles in the Terry local exchange.

The Commission should forbear from regulating Qwest as an incumbent LEC under Section 224 because doing so will not impede the development of facilities-based competition. As interpreted by the Commission, Section 224 does not provide incumbent LECs with reciprocal access to a competitive LEC’s poles, ducts, conduits, and rights-of-way. This is because Section 224 excludes incumbent LECs from the definition of telecommunications

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<sup>3</sup> 47 U.S.C. § 160.

<sup>4</sup> See 47 U.S.C. § 224.

<sup>5</sup> *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19464 ¶ 99 and n.243 (2005), *pets. for rev. dismissed and denied on the merits*, *Qwest v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

carriers, who are the entities along with cable providers who have rights as pole attachers under the section.<sup>6</sup> Most LECs, including incumbent LECs, however, have the duty to provide attachments. That is because all LECs who own or control poles, conduit and rights-of-way used to provide wire communications, and except those that are cooperatively-owned or owned by the federal government or the states, are utilities, as defined in Section 224. Moreover, providers of telecommunications service can turn to the Commission's dispute resolution procedures in the event of a disagreement. Thus, even if the Commission did not regulate Qwest as an incumbent LEC under Section 224, Qwest would continue to have a responsibility to provide pole attachments. Qwest would gain access rights to poles, ducts and conduits at just and reasonable rates, terms and conditions, and the ability to turn to the Commission's complaint procedures in the event of a dispute regarding pole attachment.

The first forbearance condition is met because it is not necessary to regulate Qwest as an incumbent LEC for purposes of Section 224 to ensure "just and reasonable" rates in Terry, Montana. Regulating Qwest as an incumbent LEC is not required to ensure "just and reasonable" pole attachment rates in Terry, as Qwest will retain the duty to provide pole attachments at just and reasonable rates.<sup>7</sup> Thus, its control over its poles would not create a bottleneck, and would not endanger just and reasonable pricing to consumers in Terry, Montana, satisfying the second forbearance condition.

Finally, forbearance from regulating Qwest as an incumbent LEC under Section 224 is in the public interest. Because Qwest would retain responsibility to provide pole attachments as a LEC, Qwest could not use its control over poles, ducts and conduits to impede competition. It would be in the public interest to allow Qwest, the smaller competitor, to obtain access to poles, ducts and conduits from other utilities at just and reasonable rates, and to allow Qwest to resort to the Commission's dispute resolution procedures. Doing so would strengthen competition against Mid-Rivers, the incumbent with the vast majority of the Terry market.

### **Section 252**

The Section 252 negotiation and approval procedures apply whenever a requesting carrier seeks to negotiate an agreement related to Section 251(b) or (c) with an incumbent LEC.<sup>8</sup> If the Commission does not regulate Qwest as an incumbent LEC pursuant to Section 252 in Terry, Montana, Qwest will be free to negotiate agreements regarding Terry services without the constraints of Section 252. Thus, if a hypothetical third entrant in Terry wants resale pursuant to Section 251(b), Qwest will be free to negotiate a commercially reasonable agreement with that hypothetical carrier without resort to Section 252 procedures, such as a timetable, resort to state

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<sup>6</sup> See 47 U.S.C. § 224(a)(5).

<sup>7</sup> 47 U.S.C. § 224(e)(1).

<sup>8</sup> See 47 U.S.C. § 252.

commission arbitration, and a mandatory requirement that Qwest allow any other carrier to sign up for the same contract.

Regulating Qwest as an incumbent LEC under Section 252 is not necessary to ensure “just and reasonable” prices in Terry for the same reasons that Section 251(c) is no longer necessary. Mid-Rivers has substantially replaced Qwest. Qwest does not maintain a level of power that would justify a continuation of Section 251(c) regulation. Moreover, Qwest does not have the market power and bargaining advantage that were thought to necessitate Section 252. Thus, the market-opening procedures of Section 252 need no longer be imposed upon Qwest. Moreover, there are no competitors in Terry that rely upon Qwest’s wholesale services.

For largely the same reasons, Sections 10(a)(2) and (3) are satisfied as well. If Qwest attempted to use freedom from incumbent LEC regulation under Section 252 to harm consumers, those consumers would simply leave Qwest. As such, the Commission should find that the second condition is satisfied. The third statutory condition for forbearance is also met. The public interest will be advanced by eliminating the economic distortions caused by the imposition of extensive regulations on Qwest, which is only a small provider in the Terry local exchange.

#### **Section 259**

Qwest also seeks forbearance from treatment as an incumbent LEC under Section 259, which requires incumbents to share their infrastructure with qualifying carriers that are eligible to receive federal universal service support but that lack economies of scale or scope.<sup>9</sup> The theory is that qualifying carriers can take “advantage of economies of scale and scope possessed by incumbent LECs”<sup>10</sup> in order to advance the Commission’s universal service goals.<sup>11</sup>

Regulating Qwest as an incumbent LEC under Section 259 is not necessary to ensure “just and reasonable” prices in Terry for the same reasons that Section 251(c) is no longer necessary. Mid-Rivers has substantially replaced Qwest in the Terry exchange, with facilities that the Commission considers superior.<sup>12</sup> Moreover, in the Terry local exchange, Qwest is unlikely to have the economies of scale and scope contemplated by Section 259. Mid-Rivers is the carrier likely to have such economies. Thus, the rationale for regulating Qwest as an incumbent LEC pursuant to Section 259 no longer applies. For the same reasons, Sections 10(a)(2) and (3) are satisfied as well.

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<sup>9</sup> See 47 U.S.C. § 259.

<sup>10</sup> *In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 5470, 5472 ¶ 2 (1997).

<sup>11</sup> *Id.* at 5512 ¶ 84.

<sup>12</sup> *Report and Order*, 21 FCC Rcd at 11509 ¶ 8.



**Section 275**

Finally, Qwest seeks forbearance from regulation as an incumbent LEC under Section 275, which pertains to alarm monitoring services.<sup>13</sup> Qwest currently does not provide such services. Nonetheless, Qwest should not be regulated as an incumbent LEC in the Terry local exchange should it begin providing such services. The effect of forbearance would be that Section 275's non-discrimination provision would not apply to any telecommunications services underlying a Qwest alarm monitoring offering. Rather, Section 202's restriction on unjust and unreasonable discrimination would apply.

Regulating Qwest as an incumbent LEC under Section 275 is not necessary to ensure "just and reasonable" prices for the telecommunications services underlying any Qwest alarm monitoring service in Terry because Qwest will remain subject to the Section 202(a) prohibition on "unjust and unreasonable" discrimination. Moreover, Qwest's network facilities do not serve as a bottleneck because Mid-Rivers has its own ubiquitous facilities. Thus, there is little danger of discrimination. For the same reasons, Sections 10(a)(2) and (3) are satisfied as well.

Respectfully submitted,

/s/ Daphne E. Butler

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<sup>13</sup> See 47 U.S.C. § 275.